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# IN THE COURT OF APPEALS OF INDIANA

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| KEITH DERRICK BIBBS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A03-0612-CR-572 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas F. Stefaniak, Jr., Judge
Cause No. 45G04-0603-FB-28

**August 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Keith Bibbs challenges the sufficiency of the evidence to support his conviction of attempted robbery, a Class B felony.[1] He asserts his conviction is improper because his taking was complete before he used force or threatened to use force against a store employee in the parking lot. Because the taking was not complete, we affirm his conviction of attempted robbery. In addition, we *sua sponte* vacate his convictions of and sentences for theft and battery. We affirm in part, and reverse in part.

## FACTS AND PROCEDURAL HISTORY

On March 6, 2006, Bibbs entered an Ultra Foods in Highland, Indiana. Evelyn Lipkovitch, a loss prevention officer for Ultra Foods, became suspicious that Bibbs was attempting to steal baby formula. Lipkovitch told another store employee, Marc Martinez, to wait by the exit doors while she watched Bibbs. Lipkovitch saw Bibbs place cans of baby formula in his coat and walk past the checkout registers without paying for the formula. Lipkovitch met Bibbs at the door and identified herself as store security. Bibbs pushed past her and left the store.

Martinez chased him, and Bibbs turned toward Martinez and swung his fist at him. Martinez avoided Bibbs' swing by stepping back. Bibbs lost his balance, and Martinez grabbed him. Both men fell down in the parking lot. Bibbs had a screwdriver in his hand and lacerated Martinez's right thigh with it.

The State charged Bibbs with attempted robbery as a Class B felony, battery as a Class C felony,[2] and theft as a Class D felony.[3] A jury found Bibbs guilty of all three

[1] Ind. Code § 35-42-5-1.
[2] Ind. Code § 35-42-2-1.

crimes. The court sentenced Bibbs to twelve years for attempted robbery, six years for battery, and two years for theft, with the sentences to be served concurrently.

## DISCUSSION AND DECISION

Bibbs challenges only his conviction of attempted robbery. When a defendant challenges the sufficiency of evidence to support his conviction, we must affirm if the facts most favorable to the judgment and the reasonable inferences therefrom would permit a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Winn v. State*, 748 N.E.2d 352, 357 (Ind. 2001). When conducting our analysis, we may neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.*

Ind. Code § 35-42-5-1 provides:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear;
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon.

Bibbs unsuccessfully attempts to distinguish his case from Indiana Supreme Court precedent directly on point. In *Coleman v. State*, 653 N.E.2d 481 (Ind. 1995),

> Coleman entered a Marsh supermarket in Muncie and proceeded to the video rental counter. At the counter, Coleman instructed a customer, Joe Williamson, to keep quiet while he pocketed five rolls of film. As Coleman was leaving the store, Williamson told a sales person what had happened, and the salesperson alerted one of the store's co-managers, Max Smith. Smith followed Coleman just outside the store, where Coleman was still standing at the store's entrance. Seeing the film protruding from Coleman's pocket, Smith asked Coleman if he had forgotten to pay for anything. Coleman then pulled a knife and threatened Smith, saying "do you want some of this." Fearing that Coleman would stab him, Smith

[3] Ind. Code § 35-43-4-2.

> retreated into the store. The police later arrested Coleman when he returned to the store.

*Id*. at 482. When affirming Coleman's conviction of robbery, our Supreme Court provided the following analysis:

> We agree with Coleman that if the "taking" was completed before Smith confronted him in front of the store, then he did not commit robbery as defined by our statute. At most, Coleman would be guilty of theft, which requires only the unauthorized exertion of control over the property of another with intent to deprive that person of the property, Ind. Code Ann. § 35-43-4-2 (West 1986), and perhaps an additional offense for threatening Smith with the knife.
>
> We have previously held, however that a "taking" is not fully effectuated if the person in lawful possession of the property resists before the thief has removed the property from the premises or from the person's presence. . . . .
>
> . . . Coleman could not have perfected the robbery without eluding Smith. Smith confronted Coleman before he left the premises and thus presented an obstacle to the taking itself. As Judge Kirsch argued in dissent to the opinion in the Court of Appeals, Coleman was only successful in removing the items from the premises and from Smith's presence by threatening him with the knife. As such, Coleman's use of force was necessary to accomplish the theft of the film and was thus part of the robbery.

*Id*. at 482-83 (internal citations omitted).

Bibbs was outside the Ultra Foods when Martinez chased him. As an employee of Ultra Foods, Martinez "is considered to be in lawful possession of the store's goods for the purpose of theft-related crimes." *Id.* at 482 n.1. Therefore, when Bibbs used a screwdriver in his attempt to flee from Martinez, he used force in his attempt to take property from the presence of Martinez. The evidence was sufficient to convict him of

attempted robbery. *See id*. at 483; *see also Young v. State*, 725 N.E.2d 78, 81 (Ind. 2000).[4]

Because we affirm Bibbs' conviction of attempted robbery, we *sua sponte* address whether his other convictions need to be vacated so Bibbs will not be subjected to double jeopardy. "If the property underlying a robbery charge is the same as that underlying a theft charge, the theft becomes a lesser included offense of the robbery, and conviction for both counts violates double jeopardy provisions." *Wethington v. State*, 655 N.E.2d 91, 97 (Ind. Ct. App. 1995). Both the robbery and battery charges required proof Bibbs knowingly or intentionally "touched" or "struck" Martinez with a screwdriver, which is a deadly weapon;[5] because there is a reasonable probability the jury used the battery to establish the essential elements of the enhancement to Class B felony robbery, we must vacate the battery conviction. *See, e.g.*, *Burnett v. State*, 736 N.E.2d 259 (Ind. 2000) (reasonable probability jury used same evidence of a stabbing to establish aggravated battery as a Class B felony and substantial risk of death required for Class A felony

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[4] In *Young*, our Indiana Supreme Court explained:

> The snatching of money, exertion of force, and escape were so closely connected in time (to sprint from house to running car parked outside), place (from door to alley), and continuity (in stealing money, then attempting to escape with it), that we hold Young's taking of property includes his actions in effecting his escape.

725 N.E.2d at 81.

[5] The information provides the following charge for attempted robbery:

> Bibbs did knowingly or intentionally, and while armed with a screwdriver, a deadly weapon, attempt to take cans of Similac from the person or presence of Marc Martinez by using or threatening the use of force on Marc Martinez by striking Marc Martinez with a screwdriver after Marc Martinez, an employee of Ultra Foods had pursued Keith Derrick Bibbs into the Ultra Foods parking lot after Keith Derrick Bibbs had taken cans of Similac from the Ultra foods store without paying for them . . . .

(App. at 8.) The information for battery provided in part that "Bibbs did knowingly or intentionally, and in a rude, insolent or angry manner, touch Marc Martinez by means of a screwdriver, a deadly weapon . . . ." (*Id.*)

robbery), *overruled on other grounds by Ludy v. State*, 784 N.E.2d 459 (Ind. 2003) (re: jury instruction). Accordingly, we vacate Bibbs' convictions of theft of the baby formula and of battery of Martinez.

Affirmed in part and reversed in part.

SHARPNACK, J., and BAILEY, J., concur.